STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL S. DORMAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED May 21, 2009
v	No. 284665 Macomb Circuit Court
GILBERT A. ZOOK, Defendant-Appellee/ Cross-Appellant.	LC No.

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

In this professional negligence case, plaintiff Michael Dorman appeals as of right from the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). Defendant Gilbert A. Zook cross-appeals from the trial court's denial of defendant's motion for award of actual costs pursuant to MCR 2.403(O)(11). We affirm in part and reverse in part and remand for proceedings consistent with this opinion.

I. Facts

This case is based upon defendant's allegedly incorrect testimony as an expert witness in an underlying zoning and inverse condemnation action. In the underlying case, plaintiff purchased property in Clinton Township ("the township") for development. After he purchased the property, the township rezoned it from "Light Industrial" to "Residential Multiple." See *Dorman v Township of Clinton*, 269 Mich App 638, 641-644; 714 NW2d 350 (2006).

Plaintiff filed a lawsuit against the township and retained the services of defendant to perform appraisal and appraisal consulting services relative to the subject property. Defendant conducted a feasibility analysis for various types of potential development of the property. In a report issued on February 9, 2004, defendant indicated that a development of the property with eight residential building sites would result in a profit of $11,200. At his deposition in the underlying lawsuit, defendant's testimony was consistent with this report. After the trial court granted the township's motion for summary disposition in the underlying case, plaintiff appealed to this Court. This Court upheld the trial court, in part relying on the testimony of defendant. Plaintiff then appealed this decision to our Supreme Court, which denied the appeal.

After this Court's decision and our Supreme Court's denial of the appeal, plaintiff retained civil engineers to advise him about issues relating to the subject property. These engineers advised plaintiff that Michigan law required that the subject property could not be divided into eight lots without complying with the platting requirements of the Michigan Land Division Act, MCL 560.101 *et. seq*. which would dramatically increase the cost of developing the property. In his deposition testimony about this case, defendant acknowledged that he did not consider the Land Division Act when performing his analysis. This failure meant that defendant was wrong when he concluded that developing the subject property into eight lots would result in a $11,200 profit.

Plaintiff filed the present malpractice case alleging that defendant's malpractice resulted in the dismissal of his underlying case. Both parties sought summary disposition. The trial court granted summary disposition in favor of defendant under MCR 2.116(C)(10), and denied plaintiff's motion. The trial court concluded that defendant's incorrect testimony was not the proximate cause of the dismissal of the underlying lawsuit.

II. Summary Disposition

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. We disagree.

This Court reviews de novo the trial court's decision concerning a motion for summary disposition. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). If genuine issues of material fact do not exist and the moving party is entitled to judgment as a matter of law, summary disposition pursuant to MCR 2.116(C)(10) is appropriate. *West, supra* at 183. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Id.,* citing *Shallal v Catholic Social Services of Wayne Co,* 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto v Cross & Peters Co,* 451 Mich 358, 369; 547 NW2d 314 (1996). While proximate cause is usually a factual question to be decided by a jury, the trial court may dismiss a claim for a lack of proximate cause where there is no genuine issue of material fact. *Helmus v Michigan Dept of Transportation,* 238 Mich App 250, 256; 604 NW2d 793 (1999).

Although there is no Michigan case law specifically addressing the standard of care for a certified general real estate appraiser, we will apply the standard usually employed for professional malpractice. A professional malpractice action is a tort claim predicated on the failure to exercise the requisite professional skill. *Stewart v Rudner,* 349 Mich 459, 468; 84 NW2d 816 (1957). An action for malpractice against an appraiser is similar to a malpractice action against in attorney. In both cases, the plaintiff has the burden of adequately alleging the following elements: (1) the existence of a professional relationship; (2) negligence in the performance of services to the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake,* 448 Mich 648, 655; 532 NW2d 842 (1995).

The sole issue for purposes of this appeal is causation. In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Here, plaintiff must show that but for defendant's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal

malpractice cases. Specifically, defendant argues that plaintiff could not show viable inverse condemnation and taking claims and that, because he could not prevail on those claims, plaintiff could not succeed in this malpractice action.

"[T]he State of Michigan recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 187-188; 521 NW2d 499 (1994). In fact, inverse condemnation may occur even without a physical taking of property, where the effect of a governmental regulation is "to prevent the use of much of plaintiffs' property . . . for any profitable purpose." *Grand Trunk W R Co v Detroit*, 326 Mich 387, 392-393; 40 NW2d 195 (1949). In short, "'[a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation.'" *Vanderlip v Grand Rapids*, 73 Mich 522, 534; 41 NW 677 (1889), quoting *Broadwell v City of Kansas*, 75 Mo 213, 218 (1881).

Here, the *Dorman* Court did rely in part on defendant's faulty analysis when it stated:

> Yet, plaintiff's own real estate appraisal expert, Gilbert A. Zook, stated that plaintiff could divide the property into eight residential lots priced at $45,000 each and sell the lots for a net profit of $11,200 after deducting costs. [*Dorman, supra* at 647-648.]

And when it stated:

> Nothing in the record suggests that plaintiff's property is unsuitable for residential development. It is located in an established residential area in which single-family residential developments have recently increased. While plaintiff alleges that there is no market for such homes in the area, his own expert witness provided evidence to the contrary. Although plaintiff had high personal expectations for his mini-storage facility, this business could, potentially, have operated at a loss. Absent any supporting evidence, plaintiff's damages are too speculative to support his claim for just compensation. [*Id*. at 648.]

However, the *Dorman* Court also stated other grounds for the dismissal of the case, including finding that "plaintiff failed to create a factual dispute that the township zoning ordinance amounted to either a de facto or a regulatory taking of his property." *Id.* at 646-647. The Court also concluded "plaintiff cannot establish that the township's rezoning of his property interfered with legally recognized "distinct, investment-backed expectations" under *Penn Central*. *Id.* at 648-649. Fatal to plaintiff's present case, is the following paragraph from *Dorman*:

> A simple visual inspection of the area would have placed plaintiff on notice that his proposed development was inconsistent with the character of the neighborhood. Moreover, plaintiff did not have a constitutionally protected right to develop his property under the "Light Industrial" zoning classification. To

> claim a vested interest in a zoning classification, the property owner must "hold[] a valid building permit and [have] completed substantial construction." This Court has specifically declined to find a taking where a municipality rezoned property while the owner's application for a building permit was pending. Plaintiff conceded that the township never granted final approval of his proposed site plans, and only encouraged his preliminary plans to develop the property. Plaintiff had not completed sufficient construction on his property for his interest to vest. [*Id*. at 649, footnotes omitted.]

In addition, on appeal to our Supreme Court, Justice Young concurred with the denial of the application for leave to appeal and commented:

> Plaintiff claims, as a result of the anticipated diminished economic return, that the rezoning constitutes a regulatory taking. However, plaintiff has no vested interest in the rezoning of the property upon which to claim a regulatory taking. In Michigan, in order to have a vested interest in the rezoning of the property, plaintiff would need to have secured a building permit for the construction necessary to take advantage of the existing zoning classification *and* expended a substantial investment in performing that construction. See, e.g., *Bevan v Brandon Twp*, 438 Mich 385, 402; 475 NW2d 37 (1991); *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562; 398 NW2d 393 (1986); *City of Lansing v Dawley*, 247 Mich 394, 396; 225 NW 500 (1929). Because plaintiff has met neither requirement, he does not have a vested interest in the rezoning of the property and may not claim a regulatory taking. [*Dorman v Township of Clinton*, 477 Mich 955; 723 NW2d 905 (2006)].

In light of the conclusion that plaintiff failed to establish a vested interest in the property in the underlying lawsuit, we find that defendant's incorrect appraisal work was not the proximate cause of the dismissal of plaintiff's lawsuit. The underlying case was dismissed for reasons independent of defendant's expert testimony.

In short, plaintiff's claim fails because he did not have a vested interest in the Light Industrial zoning of the property. While it is true that the trial court did rely upon defendant's incorrect testimony in a portion of its opinion, ultimately the underlying lawsuit was dismissed for reasons entirely independent of defendant's testimony. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

III. Actual Costs

On cross-appeal, defendant argues that the trial court erred in denying his motion for actual costs by invoking the "interest of justice" exception to MCR 2.403(O)(11). We agree.

This Court reviews de novo a trial court's decision regarding a motion for case evaluation sanctions under MCR 2.403(O). *Ivezaj v Auto Club*, 275 Mich App 349, 356; 737 NW2d 807 (2007). However, a trial court's decision to deny case evaluation sanctions pursuant to the interest of justice exception, MCR 2.403(O)(11), is reviewed for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003).

This case was submitted to case evaluation on August 27, 2007. Both sides rejected the evaluation of $85,000. After obtaining a judgment in his favor, defendant moved for an award of actual costs under MCR 2.403. The trial court denied the motion under MCR 2.403(O)(11) because "the litigation was pursued in good faith and I think that, as the rule says, in the interest of justice attorney fees are not warranted."

According to MCR 2.403(O)(11), "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." The first problem with the trial court's denial of the motion for actual costs was that the trial court failed to articulate the bases for its decision beyond merely stating that plaintiff pursued the action "in good faith." *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996) (the trial court must articulate the bases for its decision).

Furthermore, in spite of the high bar set by the "abuse of discretion" standard of review, "good faith" is not an appropriate factor to justify not imposing sanctions in the "interest of justice." *See id., supra* at 33-34. This Court has recognized several "unusual circumstances" in which a court may refuse actual costs "in the interest of justice": for example, "where a legal issue of first impression or public interest is present, where the law is unsettled and substantial damages are at issue, where there is a significant financial disparity between the parties, ... where the effect on third persons may be significant," or where the prevailing party engages in misconduct, such as gamesmanship. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005).

Here, the case did not present any "unusual circumstances" that would justify the denial of attorney fees under MCR 2.403. This case did not involve an issue of first impression. The governing law was not unsettled, and there were no substantial damages at issue. There was no indication that plaintiff's failure to accept the award within the time frame proscribed by MCR 2.403 was inadvertent or the result of clerical error. Further, nothing in the trial court record indicates that there was a significant financial disparity between the parties, or that the effect of the decision on third persons would be significant. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 473; 624 NW2d 427 (2000); *Luidens, supra* at 35. Additionally, nothing in the record indicates that defendant engaged in gamesmanship or other misconduct in this case. *Stitt, supra* at 471-476. We reverse the trial court's denial of actual costs.

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio